

Saturns and Rickshaws Revisited: What Kind of Employment Arbitration System has Developed?

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I. INTRODUCTION¹

In an influential 2001 article, Prof. Samuel Estreicher analogized employment arbitration to a “Saturn” system of justice, referring to the then prominent economy car line produced by General Motors.² He contrasted this to the inequality in the employment litigation system, where a few who were successfully able to access it would receive a Cadillac system of justice with high levels of due process, whereas the larger group of employees who were unable to obtain access to the courts would be left with a Rickshaw system providing no effective access to justice for their claims.³

Estreicher’s argument resonates powerfully because it provides a positive public policy vision justifying the use of employment arbitration and guiding its development. It moves beyond the at times formalistic and simplified assumptions of many of the court decisions that led to the expanded deferral

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¹ Access to the data examined in this study was thanks to the assistance of the American Arbitration Association, which we very gratefully acknowledge. We would particularly like to express our appreciation to the staff of the AAA’s Boston office, where we conducted our review of the employment arbitration case files, which they had assembled from across the country. Given the sensitive nature of many of the issues around employment arbitration, organizations involved in this area have natural concerns about disclosure of information. There is a tension between the privacy interests in employment arbitration and the importance of the public policy issues involved. In our view it is to the AAA’s credit that they provided us with access to this data for research purposes, which we hope will advance public policy and knowledge in this area. Any findings, conclusions, and errors in this research are, of course, entirely our own responsibility.

² Samuel Estreicher, *Saturns for Rickshaws: The Stakes in the Debate over Pre-Dispute Employment Arbitration Agreements*, 16 OHIO ST. J. ON DISP. RESOL. 559, 563–66 (2001).

³ *Id.* at 563–64.

of the courts to arbitration.⁴ Rather than simply arguing that interpretation of the Federal Arbitration Act requires enforcement of arbitration agreements, Estreicher is arguing that as a matter of public policy we should be supporting the expansion of mandatory employer promulgated arbitration procedures because they will enhance the access by employees to justice in the workplace. If correct, this provides perhaps the strongest rationale for mandatory arbitration and should lead to both legislative and judicial actions directed at removing impediments to its adoption.

Estreicher was able to marshal some empirical evidence about employment arbitration in support of his argument. However, he was writing at a time when empirical research on employment arbitration was in its infancy with only a small number of researchers having examined relatively small samples of arbitration cases.⁵ During the 1990s when this early research was conducted, relatively fewer employers had yet adopted mandatory arbitration procedures and few cases had been heard in arbitration based on these employer promulgated procedures.⁶ Indeed, the larger number of employer arbitration cases during this period were based on individually negotiated agreements, typically involving higher level employees such as senior executives who are able to negotiate detailed individual contracts, often with the assistance of their own legal counsel.⁷ Since that time,

⁴ For example, in the key decision in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (1991), the majority cited on the key issue of the adequacy of arbitration its previous reasoning in *Mitsubishi Motors* that, "So long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 (1985). The court provides no evidence to support this assumption, instead offering it as an assertion that presumes the conclusion that it is supposed to support. Arbitration can have advantages and disadvantages as a dispute resolution mechanism. The question for public policy is whether or not the relevant advantages outweigh the disadvantages of using this mechanism.

⁵ See, e.g., Lisa B. Bingham, *Emerging Due Process Concerns in Employment Arbitration: A Look at Actual Cases*, 47 LAB. L.J. 108, 110–12 (1996); Lisa B. Bingham, *Employment Arbitration: The Repeat Player Effect*, 1 EMP. RTS. & EMP. POL'Y J. 189–90 (1997); Lewis L. Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 COLUM. HUM. RTS. L. REV. 29, 30–31 (1998).

⁶ Alexander J.S. Colvin, *Empirical Research on Employment Arbitration: Clarity Amidst the Sound and Fury?*, 11 EMP. RTS. & EMP. POL'Y J. 405, 408–09 (2007).

⁷ Lisa B. Bingham, *An Overview of Employment Arbitration in the United States: Law, Public Policy and Data*, 23 N. Z. J. INDUS. REL. 5, 9 (1998); Colvin, *supra* note 6, at 406–08.

employer promulgated procedures have spread more widely⁸ and we have seen larger numbers of cases in arbitration based on these procedures.⁹ As a result, more recent research has been able to examine larger scale datasets that focus on employment arbitration cases that are based on employer promulgated procedures.¹⁰ A major source of data driving this new research is disclosure mandates placed on arbitration service providers under the California Code of Civil Procedure. However those disclosure requirements only apply to a limited set of information about each arbitration case, providing only a partial picture of the current state of employment arbitration.

In this article, we examine a new, more detailed dataset of employment arbitration cases administered by the American Arbitration Association (AAA), which includes information on many important aspects of these cases that are not included in the California Code of Civil Procedure disclosure requirements. With the availability of this new data, we are able to revisit Estreicher's argument and look at the question of whether employment arbitration has become a new Saturn system of justice providing better access to employees and to what degree it is different from the Cadillac-Rickshaw system of justice in employment litigation. We begin by describing our new data and then turn to examining what it tells us about employment arbitration as a system of justice providing access to employees.

II. THE DATA

In this study, we examine data on all employment arbitration cases that were administered by the AAA nationally and that terminated in 2008. Overall there were 449 AAA employment arbitration cases that terminated that year. Our initial sources of data were AAA files containing information on the parties; claim and award amounts; key dates for proceedings; and other important case characteristics. These AAA files are used by the organization as the basis for its publicly available filings on consumer

⁸ Alexander J.S. Colvin, *Institutional Pressures, Human Resource Strategies, and the Rise of Nonunion Dispute Resolution Procedures*, 56 INDUS. & LAB. REL. REV. 375, 376 (2003); David Lewin, *Employee Voice and Mutual Gains*, PROCEEDINGS OF THE 60TH ANNUAL MEETINGS OF THE LABOR AND EMPLOYMENT RELATIONS ASSOCIATION 61, 61–62 (2008).

⁹ Colvin, *supra* note 6, at 408–09.

¹⁰ Colvin, *supra* note 6, at 407; Alexander J.S. Colvin, *An Empirical Study of Employment Arbitration: Case Outcomes and Processes*, 8 J. OF EMPIRICAL LEGAL STUD. 1 (2011).

arbitration cases, which include employment arbitration cases based on employer promulgated procedures, required under California Civil Code provisions¹¹ regulating arbitration service providers.¹² However, the AAA's files include additional information that is not required to be included with the California mandated public filings. In addition, we were able to review in detail the full case files for 217 of the employment arbitration cases, which allowed us to investigate a number of aspects of arbitration proceedings not included in the standard AAA data files. This in-depth case file investigation also provided an opportunity for checking the reliability of the information in the AAA data files, and hence, also in the California mandated public disclosure information provided by the AAA. Our comparison of these data sources indicates that the AAA's data files and public disclosures are highly accurate. We identified a few minor corrections in claim and award amounts; however, the error rates were very low for the relatively large and complex data sets involved and typical of normal measurement error found in data sets.

As with any research that focuses on a particular data source, the nature of the data imposes some limitations that need to be recognized. The AAA is the largest provider of employment arbitration services, however its practices and cases may not be representative of other service providers or especially what is occurring in ad hoc arbitration cases where there is no arbitration service provider administering the case. Notably, the AAA has written its employment arbitration rules to comply with the terms of the Due Process Protocol developed by a number of leading participants in arbitration in the 1990s.¹³ For arbitration cases based on employer promulgated procedures, the AAA policy is that it will not administer cases under procedures that violate its rules.¹⁴ For example, if it decides that the case is based on an employer

¹¹ CAL. CIV. PROC. CODE § 1281.96 (West 2007).

¹² Colvin, *supra* note 6, at 407–08; Colvin, *supra* note 10, at 1.

¹³ Some other organizations, notably JAMS (Judicial Arbitration and Mediation Services, Inc.) in the employment arbitration setting, have also adopted similar due process protections. Current JAMS policy is that it will not administer any employment arbitration that does not meet its minimum fairness standards, which parallel the provisions of the due process protocol, unless the arbitration agreement was individually negotiated by the employee or negotiated with the advice of counsel. JAMS Policy on Employment Arbitration Minimum Standards of Procedural Fairness, effective Jul. 15, 2009, JAMS, *available at* www.jamsadr.com/minimum-employment-standards (last visited May 31, 2013).

¹⁴ The AAA's authority to decline cases on this basis is set out in: AAA Employment Arbitration Rules and Mediation Procedures, effective Nov. 1, 2009

promulgated procedure, it will only administer the case if the employer pays the arbitrator's fee, apart from a minimal filing fee.¹⁵ This standard places a more universal burden on employers than the courts have done, where based on the *Green Tree Financial v. Randolph*¹⁶ standard the question of whether or not the employee can be required to pay arbitrator fees is determined on a case by case basis using the criterion of ability to pay. As a result, we may be examining a relatively employee-favorable setting for employment arbitration, particularly in comparison to ad hoc arbitrations where there is no administering organization.

A. *What Types of Claims are Brought in Employment Arbitration?*

We begin by examining the type of claims brought in employment arbitration and the characteristics of the employees who bring them.

1. *How Many are Based on Employer Promulgated Procedures?*

Employment arbitration cases can be divided into two categories based on differences in how the arbitration agreement was formed. Much of the debates around employment arbitration have focused on what are variously described as employer promulgated or mandatory arbitration agreements. In employer promulgated arbitration procedures, the employer adopts arbitration as a standard policy governing dispute resolution with its employees. The employees are then presented with the employment arbitration agreement as a standard form adhesive contract that they must accept or reject on a take-it-or-leave-it basis. The arbitration agreement is a mandatory term and condition of employment in the sense that if the prospective employee does not sign it, then the offer of employment will be rescinded, leading to the moniker of mandatory arbitration. In this respect, employer promulgated arbitration procedures are similar to many other terms and conditions of employment that govern most employees, arising from standard organization-wide employment policies developed by the employer

available at http://www.adr.org/aaa/ShowProperty?nodeId=/UCM/ADRSTG_004362&revision=latestreleased (last visited Oct. 24, 2013).

¹⁵ Jacquelin F. Drucker, *The Protocol in Practice: Reflections, Assessments, Issues for Discussion, and Suggested Actions*, 11 EMP. RTS. & EMP. POL'Y J. 345, 351 (2007).

¹⁶ *Green Tree Financial Corp. v. Randolph*, 531 U.S. 79, 88–92 (2000).

that are not subject to individual level variation or modification. Many employment arbitration cases involve this type of employer promulgated arbitration procedure¹⁷ and they have been the focus of much of the debate over employment arbitration.

However, other employment arbitration cases arise in the context of individually negotiated agreements. In this setting, the prospective employee is individually negotiating the terms and conditions of employment and not simply adhering to standard employment policies of the organizations. The best known example of this situation is the negotiation of executive level employment contracts, which include many non-standard features such as specific termination and severance provisions and individualized compensation and benefit packages. In the course of individually negotiating these contracts, some parties enter into arbitration agreements to resolve any contractual or other disputes that may arise in the course of the relationship. Beyond the differences in their contractual origins, there are good reasons to suspect that the characteristics of the employees and the cases they bring under individually negotiated agreements will differ substantially from their counterparts under employer promulgated procedures. Individually negotiated agreements are likely to involve wealthier, more sophisticated employees who are more likely to be able to retain better legal counsel. The cases they bring are likely to involve claims based on the individual contracts they have negotiated, which may provide an easier basis for proving claims than employment statutes. For this reason, in any empirical analysis of employment arbitration it is critical to distinguish between cases based on individually negotiated agreements and those based on employer promulgated procedures.

In many of the early studies of employment arbitration, most of the cases included in the datasets involved individually negotiated arbitration agreements rather than employer promulgated procedures.¹⁸ This may have

¹⁷ See, e.g., the procedure at issue in the leading case of *Circuit City v. Adams*, 532 U.S. 105, 109–10 (2001) was a standard employment arbitration policy that had been promulgated by the employer throughout the organization on an adhesive basis, without individual negotiated of its terms with employees. For a more detailed discussion of the Circuit City arbitration procedure and its promulgation, see Zev Eigen, *The Devil in the Details: The Interrelationship among Citizenship, Rule of Law and Form-Adhesive Contracts*, 41 CONN. L. REV. 381, 401–02 (2008).

¹⁸ For example, the early studies of employment arbitration by Bingham (1996, 1997), Maltby (1997), Bingham and Sarraf (2004), and Eisenberg and Hill (2003), all involve samples that were mostly individually negotiated agreement cases. Eisenberg and Hill (2003) note this distinction in the types of cases, but only have a relatively small

contributed to a misleading picture of employment arbitration. Our results will suggest that arbitration under individually negotiated agreements has very different characteristics and outcomes than arbitration under employer promulgated agreements. The dataset of AAA employment arbitration cases that we analyzed included all individually negotiated and employer promulgated procedure based cases administered by the AAA in 2008. The AAA conducts a preliminary review of employment arbitration cases that it administers before proceeding begin in order to determine which category they fall into. This classification process conducted by the AAA is substantively important because the AAA will only administer employer promulgated procedure cases under its own employment arbitration procedure rules. These standard AAA rules include a requirement that for employer promulgated procedure cases the employer pay all arbitrator fees and administrative costs apart from a small filing fee, whereas the agreement can determine fee allocation between the parties in individually negotiated agreement cases. This classification of cases is done based on an internal review by the AAA of the agreements. In our own review of the materials in the arbitration case files, we did not find any instances where we would have made a different classification of the case from that made by the AAA and in almost all cases the classification process was relatively straightforward.

Overall in our dataset we find that employer promulgated procedure cases are more common, comprising 325 of the 449 total cases (72.4%), whereas individual negotiated agreement cases comprise the remaining 124 cases (27.6%). Our dataset includes all cases administered by the American Arbitration Association in 2008, so this indicates that the largest portion of employment arbitration by this period involved employer promulgated procedures. This finding suggests that results from earlier research that involved samples primarily consisting of individually negotiated agreement cases should be treated with caution in extrapolating to the more recent period.

sample of employer promulgated procedure cases, and in their analysis compare litigation outcomes with those from individually negotiated agreement arbitration cases and not with the employer promulgated procedure cases. See Lisa B. Bingham & Shimon Sarraf, *Employment Arbitration Before and After the Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of Employment: Preliminary Evidence that Self-Regulation Makes a Difference*, in ALTERNATIVE DISPUTE RESOLUTION IN THE EMPLOYMENT ARENA: PROCEEDING OF THE N.Y.U. 53RD ANNUAL CONFERENCE ON LABOR 303 (Samuel Estreicher & David Sherwyn eds. 2004); Bingham, *supra* note 5, at 110–12; Bingham, *supra* note 5, at 190; Maltby, *supra* note 5, at 30–31; Theodore Eisenberg & Elizabeth Hill, *Arbitration and Litigation of Employment Claims: An Empirical Comparison*, 58 DISP. RESOL. J. 44, 44–45 (2004).

2. *How Many Cases Involve Employer Claims?*

Another important distinction to make in analyzing arbitration cases is between cases involving claims by employees and those involving claims by employers. Although the typical employment case involves an employee plaintiff making a claim such as being wrongfully terminated or discriminated against in the workplace, there are also some cases involving employer claims. Examples of these types of claims include efforts to recover salary advances paid to employees who quit their employment prior to the end of the pay period or claims seeking to recover severance payments where the employee subsequently breaches the terms of the agreement. In our sample, amongst cases based on employer promulgated procedures, 28 of 325 (8.6%) involved claims by employer plaintiffs. By contrast, amongst cases based on individually negotiated agreements, 20 of 124 (16.1%) involve claims by employer plaintiffs. The higher incidence of employer claims amongst cases based on individually negotiated agreements likely reflects the more widespread use of salary advances, severance, and other special payments to higher salary employees. Although they represent only a small segment of total cases, it is important to account for employer plaintiff cases since they may have different characteristics from cases brought by employee plaintiffs. Grouping the two categories of cases together could bias estimates of case characteristics and outcomes.

3. *What Kinds of Employees Bring Claims in Employment Arbitration?*

We are able to examine a number of individual characteristics of employees who bring claims in employment arbitration. Of the employee plaintiffs in cases based on employer promulgated procedures, we find that 54.8% were men and 31.8% were managers. Amongst these employee plaintiffs, 83.1% had salaries of under \$100,000 per year. These findings indicate that most plaintiffs in employer promulgated procedure cases are middle to lower level employees.

By contrast, the characteristics of employee plaintiffs in individually negotiated agreement cases are very different. Of these employee plaintiffs, 86.4% are male and 65.8% are managers. Amongst these employee plaintiffs, only 20.9% made less than \$100,000 per year, whereas 62.7% made between \$100,000 and \$250,000 per year and 16.4% made over \$250,000 per year. This indicates that individually negotiated cases predominantly involved higher level employees compared to the employees in employer promulgated procedure cases.

4. *What Damages are Claimed in Employment Arbitration?*

The median or typical claim brought by employee plaintiffs under employer promulgated procedures is \$167,880. There are some relatively large claims, with the top 10% of claims being \$2,000,000 or greater. There are relatively few small claims, with the 25th percentile of the distribution of claims falling at \$61,984, meaning that three-quarters of the claims are greater than this amount. This is an important comparison point since some past research has suggested that damages of at least \$60,000 are necessary for it to be feasible to proceed to litigation with an employment case.¹⁹ Our results suggest that the claim amounts in arbitration cases based on employer promulgated procedures are mostly in the range as those that are seen in litigation.

By comparison, the median or typical claim brought by employee plaintiffs under individually negotiated agreements is \$233,427. There are also relatively few small claims in this category, with the 25th percentile of the claim distribution falling at \$88,204. Interestingly, although the size of claims brought under individually negotiated agreements is higher, the median claim is only 39% larger than that for employer promulgated procedure claims. This may indicate that despite the generally higher salaries of employees covered by individually negotiated agreements, in either instance it requires a reasonably large potential claim for it to be feasible to bring a claim in arbitration.

5. *How Many Cases Involve Statutory Claims?*

The leading cases and much of the debate around mandatory employer promulgated procedures in employment arbitration has focused on cases involving statutory claims.²⁰ Major employment statutes such as Title VII of the Civil Rights Act embody important public policies, leading to concerns about the resolution of these statutory rights in the private forum of employment arbitration. Some researchers have suggested that in practice this concern is overblown because cases brought in employment arbitration might not involve many statutory issues.²¹ The problem with this argument is

¹⁹ William M. Howard, *Arbitrating Claims of Employment Discrimination*, 50 DISP. RESOL. J. 40, 44 (1995).

²⁰ See, e.g., *Gilmer v. Interstate/Johnson Lane*, 500 U.S. 20 (1991); *Circuit City v. Adams*, 532 U.S. 105 (2001).

²¹ Eisenberg & Hill, *supra* note 18, at 44-45.

that it was based on samples that included mostly cases based on individually negotiated agreements, rather than the cases based on employer promulgated procedures that have been at the center of debates around employment arbitration. By contrast, in our sample, as noted earlier, most of the cases were based on employer promulgated procedures. We had access to the complete case files for 217 of the employment arbitration cases, which allowed us to determine the nature of the claims being brought in them. We found that 79 out of 146 cases (54.1%) brought by employees under employer promulgated procedures involved statutory claims. By contrast only 5 out of 44 cases (11.4%) brought by employees based on individual negotiated agreements involved statutory claims. These results indicate that for the type of employer promulgated procedure case that has been the central focus of public policy debates about employment arbitration, statutory claims are frequent and constitute a majority of all cases brought.

6. *How Many Cases Involve Ongoing Employment, i.e. Not Post Termination Disputes?*

Very few cases involve ongoing employment relationships as opposed to disputes that arise following termination of the employment relationship. In only 10 out of 195 cases (5.1%) brought by employees where we could identify the employment status of the plaintiff was there a non-termination situation. If anything this may be an upper estimate of the likelihood of arbitration being used in the context of ongoing employment since we do not know whether the employee continued in employment after the closing of the case. Employment arbitration cases mostly involve employees who have been fired or quit and arbitration does not appear primarily to be a mechanism for resolving conflict in existing employment relationships.

B. *What Type of Representation do Parties Have in Employment Arbitration?*

Representation of parties, particularly of employees, is an important but understudied phenomenon in employment arbitration. The ability to obtain effective attorney representation can be a key factor in the ability to proceed with a claim. The difficulty for employees to obtain effective attorney representation has been one of the criticisms leveled at the employment litigation system. Given that most lower to middle income employees will be unable to afford to pay typical hourly attorney fees, they are left reliant on the system of contingency fee arrangements, where the plaintiff attorney

himself or herself provides the primary financing for the case and takes the financial risk of success or failure. The plaintiff attorney financed nature of this system creates a bias towards only taking cases with a relatively high prospect of success and large provable damages. This barrier to representation is at the heart of Estreicher's critique of the Rickshaw-Cadillac system of justice in litigation. If employment arbitration is to serve as a more accessible Saturn system of justice, then we should expect to see employees being more able to obtain representation and/or able to proceed more effectively without attorney representation than is the case in litigation. We begin by examining the patterns of representation in employment arbitration cases and then later turn to the effects of representation.

1. *How Many Employees are Self-Represented?*

Self-representation is an important phenomenon to consider in evaluating whether employment arbitration in practice provides a more accessible dispute resolution system than litigation. In employment litigation, just under a quarter of employee plaintiffs are self-represented.²² By comparison, in our sample in 102 out of 325 (31.4%) cases based on employer promulgated procedures the employee was self-represented with no attorney. This suggests a slightly higher self-representation rate than in litigation, though not a large difference. A large majority of employee plaintiffs in both forums are represented by attorneys. In this area we see a very different pattern for cases based on individually negotiated agreements, where only 10 out of 124 (8.1%) cases involve self-represented employees. This greater likelihood of attorney representation likely reflects the higher salaries and professional or managerial background of employees involved in individually negotiated agreement cases.

²² Nielsen, Nelson, and Lancaster find in a study of employment discrimination cases filed in federal district courts that 14.8% of plaintiffs were pro se throughout litigation and a further 7.7% initially filed pro se but subsequently obtained representation at some point during the proceedings, making a total of 22.5% of cases that were initially filed by pro se plaintiffs. Laura Beth Nielsen, Robert L. Nelson, & Ryon Lancaster, *Individual Justice or Collective Legal Mobilization? Employment Discrimination Litigation in the Post Civil Rights United States*, 7 J. EMPIRICAL LEGAL STUD. 175, 200 (2010).

2. *Who Represents Employees and Employers in Employment Arbitration?*

Amongst employees who do have representation in employment arbitration, what can we say about the attorneys who are providing this representation? How are they similar or different to the attorneys representing employers in these cases? One aspect to consider is whether the attorney specializes in the employment law area. To the degree that the attorney specializes in employment law cases we might expect greater knowledge and expertise in this area. This could be a particular advantage in employment arbitration cases because it could result in greater familiarity with potential arbitrators, producing an advantage in the arbitrator selection process. We examined this issue initially by looking at whether or not the attorneys included employment law amongst their practice areas in the Martindale-Hubbell listings of attorneys. Almost all the attorneys in our database were included in the Martindale-Hubbell listings and most of them listed their practice areas. For those that did not list practice areas or were not in the directory, we searched other online listings of attorney and/or consulted their individual websites.

Amongst attorneys representing employees in cases under employer promulgated procedures, 56.7% included employment law in their primary practice areas. By contrast amongst attorneys representing employers in the same cases, 76.6% included employment law in their primary practice areas. To provide another measure of specialization relative to employment arbitration in particular, we examined the number of cases in our database that the same firm handled. We focused on law firm rather than individual attorney here to look at the degree to which firms provide expertise to parties. In cases based on employer promulgated procedures, most often the law firm representing the employee only appeared once in our database, with only 10.7% of cases involving an employee side law firm that appeared in two or more cases. By contrast, in over half of these same cases, 54.6% of the time, the employer was represented by a law firm that handled more than one case in our dataset. What these statistics indicate is that in employment arbitration under employer promulgated procedures, employers are much more likely to be represented by attorneys that specialize in employment law and by law firms that handle employment arbitration cases frequently.

Some similar patterns are found in cases based on individually negotiated agreements, though the differences between employee and employer representation are smaller. In cases based on individually negotiated agreements, 46.7% of the time the employee was represented by an attorney specializing in employment law, whereas 60.8% of the time the employer

was represented by an employment law specialist. Only 6.7% of the time in the individually negotiated agreement cases was the employee represented by a law firm appearing more than once in our database, whereas in those same cases 19.3% of the time the employer was represented by a firm appearing more than once in our database.

C. How Does the Process of Employment Arbitration Work?

1. How Many Cases Settle?

Our detailed analysis focuses on the files of cases that were resolved through an award, i.e. a final decision by an arbitrator. However we are able to examine patterns of type of disposition using a broader dataset of all employment and consumer cases administered by the AAA. This dataset is provided to the public by the AAA under California Code provisions regulating arbitration service providers. It only contains cases brought under employer promulgated procedures, not those based on individually negotiated agreements, however it does provide a comprehensive set of all the AAA's promulgated cases. Using this dataset, we calculate that of the employment arbitration cases resolved in 2008, 26.9% were disposed of by an award by an arbitrator. Of the remainder, 13.3% were withdrawn by the plaintiff and 59.5%, were settled. This settlement rate is similar to the 58% settlement rate in federal court employment discrimination litigation reported by Nielsen, Nelson, and Lancaster²³, indicating that in arbitration as in litigation, the predominant mode of resolution is settlement.

As with litigation settlements, the vast majority of arbitration settlements are confidential and so we do not know their content. We would certainly expect that in both forums the settlements would be influenced by the likely outcomes of a hearing in litigation or arbitration, respectively. However we do not have evidence on the nature of the cases that are settling and what type of selection effects this may exert on the sample of cases that do proceed to a hearing. It may be that defendants are willing to settle relatively strong cases before a hearing on favorable terms to the plaintiffs, so that only the less meritorious cases proceed to a hearing. Or alternatively it could be that plaintiffs are unwilling to proceed with weaker cases to a hearing and instead are willing to accept any small amount as a settlement, leaving only the relatively stronger cases to go to a hearing.

²³ *Id.* at 187.

2. *How Frequent are Summary Judgment Motions in Employment Arbitration?*

One procedural step that is likely to influence the selection process of which cases ultimately go to a hearing is summary judgment. Summary judgment motions are widely used in litigation, with defendant employers frequently obtaining dismissals of employment lawsuits.²⁴ Although this filtering of unmeritorious cases will certainly result in a stronger pool of cases proceeding towards trial, there may also be an offsetting effect on settlement behavior. If the employer brings a summary judgment motion that is denied, this may provide information signaling to the defendant that the plaintiff has a relatively stronger case and increase the incentive to offer a larger settlement that is more likely to be accepted. Thus we would expect settlements between the summary judgment motion and trial stages in litigation to filter out more of the relatively strong cases, which would then not proceed to a hearing.

By contrast, arbitrators traditionally disfavored summary judgment motions. The idea was that arbitration is a process that provides a hearing on the merits of the case without complex procedures or legal formalities. Indeed the absence of motion practice with its potential advantages to employers is one of the strong arguments in favor of employment arbitration being an employee-favorable “Saturn” system of dispute resolution in Estreicher’s terms.²⁵ However in recent years there have been anecdotal suggestions that motion practice and summary judgments have increased in frequency in employment arbitration as the procedure has become dominated by attorneys accustomed to litigation practice.

We were able to examine this issue in our study by examining the number of employment arbitration cases in which defendants filed summary judgment motions with the arbitrator and the numbers that were granted. We were able to do this for the 217 employment arbitration cases for which we were able to review the full case file, including all motions filed. Overall, we found that motions for summary judgment were made in 52 of 217 cases or 23.9% of the time. Of these motions, 25 were granted in full and 12 in part, indicating some degree of success in 37 cases or 17.1% of the time. Amongst different types of cases, we found the highest incidence in cases brought by employees under employer promulgated procedures, where there were 43

²⁴ Kevin M. Clermont & Stewart J. Schwab, *How Employment Discrimination Plaintiffs Fare in Federal Court*, 1 J. EMPIRICAL LEGAL STUD. 429, 432–36 (2004).

²⁵ Estreicher, *supra* note 2, at 563.

motions for summary judgment out of 149 cases or 28.9% of the time. These motions were fully granted in 21 cases and partially granted in 12 cases, for a total of 33 cases or 22.1% in which there was some degree of success with a summary judgment motion. Although still occurring in a minority of all cases, these results indicate that summary judgment has become a significant element in employment arbitration and that in a number of cases it results in the plaintiff not being able to obtain a hearing on the merits.

3. *How Long do Cases Take to be Resolved?*

One of the key advantages of arbitration in the area of accessibility is that cases take less time to proceed to a hearing than do cases in litigation. In employment litigation, it is typical for cases to take around two years on average to reach trial, whereas in employment arbitration, time to hearing is more typically around one year.²⁶ The time to hearing in our sample is consistent with these findings. Amongst employment arbitration cases in 2008 based on employer promulgated procedures, we found a mean time from initial filing to resolution following a hearing of 366.9 days, almost exactly a year. Amongst cases that settled in this group, we found a mean time from filing to settlement of 278.9 days.

4. *How Many Hearing Days do Cases Involve?*

Another aspect of the argument in favor of employment arbitration accessibility is that the process of resolution tends to be simpler. One indicator of this is the amount of time it takes to conduct a hearing. The median or typical case in our sample had two days of hearings and one preliminary organizational conference call. Some cases did involve more extensive proceedings. The upper tenth percentile of cases in terms of hearing length involved 5 or more days of hearing and 2 or more preliminary conference calls. This pushes the mean or average number of hearing days per case up to 2.3 and the average number of preliminary conference calls to 1.5. Interestingly, these statistics do not vary significantly between employer promulgated procedure and individually negotiated agreement cases, indicating similar levels of procedural complexity for these two categories. Overall employment arbitration appears to involve some degree of procedural complexity, though less than we would expect in typical court proceedings.

²⁶ Colvin, *supra* note 10, at 8.

5. *How Much are Arbitrator Fees?*

We find that the median or typical arbitrator fee in a case is \$9,450, whereas the mean or average arbitrator fee is \$15,097, indicating a right skewed distribution with a few relatively large fee amounts. Arbitrator fees in cases involving employer promulgated procedures are somewhat lower, with a median fee amount of \$8,890 and a mean fee amount of \$12,264. By contrast, for cases involving individually negotiated agreements, the median fee amount is \$13,142 and the mean fee amount is \$22,521. Given that the numbers of preliminary conference calls and numbers of hearing days are very similar across the two categories of cases, this suggests that arbitrators in cases involving individually negotiated agreements are charging substantially higher daily and hourly fee rates than those in cases involving employer promulgated procedures. This could be an advantage for employer promulgated procedures in indicating a lower cost procedure, but also may indicate a disadvantage if the higher fee rates in the individually negotiated agreement cases reflect arbitrators with greater experience or expertise. In any event, this will likely have little impact on accessibility from the employee perspective in that we find in the employer promulgated procedures cases we examined that the employer paid all arbitrator fees in accordance with the AAA's policy requiring this in the cases they administer. The greater impact of arbitrator fee amounts may be on whether it affects the employer decision whether or not to promulgate a mandatory arbitration procedure in the first place.

D. *What are the Outcomes of Employment Arbitration?*

1. *What is the employee win rate?*

Employee win rates in employment arbitration vary substantially depending on the type of case and whether the employee or the employer is the plaintiff. In the cases based on employer promulgated procedures where the employee is the plaintiff, employees won 24.7% of the time. This is using a broad definition of an employee win where there was any finding of liability, even if the amount of damages awarded was relatively small compared to the amount claimed. By contrast, in individually negotiated agreement cases where the employer is the plaintiff, the employee won 64.6% of the time. This may reflect both the greater sophistication and better counsel available to the generally higher income group of plaintiffs in these cases. It also may be a product of more of these cases being based on contractual claims that are easier to establish than the statutory

discrimination claims more common in the employer promulgated procedure cases. Meanwhile, in cases where the plaintiff is the employer, there is a relatively high success rate for these employer plaintiffs under either employer promulgated procedures, 57.1%, or individually negotiated agreements, 66.7%.

2. *What Damage Amounts are Awarded in Employment Arbitration?*

Damages exhibit a similar pattern of varying with the type of case and who is the plaintiff. There are a number of different statistical measures of damage amounts that we can look at to give a fuller picture of the outcomes of employment arbitration. Focusing initially on the category of cases brought by employee plaintiffs under employer promulgated procedures, we find that amongst the 91 cases where the employee won the case, the median or typical damage award was \$39,609. The median claim in these cases was \$100,000, indicating that successful employees typically received around 40 cents on each dollar sought. The mean or average damage award received by successful plaintiff employees was \$81,835, with this larger average reflecting a right skewed distribution with a few relatively large awards amongst a greater number of more moderate award amounts. These statistics give us a picture of the outcomes in cases that employees won. However, it is also useful to consider the overall nature of outcomes including the cases that employees lost as well as those the employee won.²⁷ From an economic perspective, this is the expected outcome across all cases, including both the probability of success and the amount won if successful. From a legal system perspective, this is also an important measure because it indicates the average likely outcome for a plaintiff or plaintiff attorney initiating a case. Particularly for an attorney who is representing employees in a number of different cases on a contingency fee basis, it is an important measure because it indicates the average expected outcome for that whole portfolio of cases. We find that the mean or average damages amongst the 291 cases brought by employee plaintiffs under employer promulgated procedures was \$19,967.²⁸

The patterns of outcomes look very different when we compare different types of cases and categories of plaintiffs. In cases brought by employee

²⁷ Colvin, *supra* note 10, at 20.

²⁸ For this category of cases, including employee losses as well as wins, the median is not a particularly informative statistic, being \$0 because most employees lost their cases.

plaintiffs under individually negotiated agreements, the median damage award in the 64 cases won by employees was \$75,000 and the average damages were \$220,736. Amongst all 99 cases in this category, including employee losses, the average damages were \$142,465. As expected, employee plaintiffs recover much more in cases under individually negotiated agreements than under employer promulgated procedures. This reflects larger amounts claimed in the individually negotiated agreement cases with the median damage claim of a successful plaintiff having been \$207,000, so that the typical award of \$75,000 represents about 36 cents per dollar claimed, close to the rate for plaintiffs under employer promulgated procedures. The more noteworthy difference is that the greater chance of success for employee plaintiffs under individually negotiated agreements, combined with the larger amounts being claimed and awarded, means that the overall expected outcome across all cases is \$142,465. This is 7.1 times as large as the equivalent expected outcome of \$19,967 in the employer promulgated procedure cases. This means that from the perspective of a plaintiff attorney considering which cases to take in employment arbitration, there is a strong and clear economic incentive to take cases based on individually negotiated agreements rather than those based on employer promulgated procedures.

Damage amounts in cases involving employer plaintiffs are generally smaller, likely reflecting the different nature of claims in these cases, which are often efforts to recover overpayments or pre-payments of compensation to employees.²⁹ For employer promulgated procedure cases with employer plaintiffs, the median or typical damage award to a successful plaintiff was \$10,000 and the mean award was \$39,002. For individually negotiated agreement cases with employer plaintiffs, the median award to a successful plaintiff was \$36,014 and the mean award was \$152,947.

3. *How Common are Punitive Damages?*

Punitive damages are a relatively uncommon but important remedy in that they serve to deter egregious behavior by imposing greater sanctions beyond normal compensatory awards. In the employment law area, a key feature of the Civil Rights Act of 1991 was that it amended Title VII to permit jury trials and compensatory and punitive damages, albeit with caps depending on the size of the employer, whereas these had previously not been permitted in employment discrimination claims under the Federal Civil

²⁹ A few employer plaintiff cases also involved fraud claims.

Rights Act.³⁰ Punitive damage awards in jury trials are often seen as an expression of the jury's embodiment of popular outrage at especially reprehensible conduct by defendants. By contrast, arbitrators are professional neutrals and may be less likely to be swayed by the same popular concerns of juries. For critics of litigation, this might be seen as an advantage of arbitration, but if punitive damage awards are considered an important element of how the litigation system polices and deters conduct that goes against public policy then failures to award punitive damages in arbitration could be of significant concern.

In our dataset we were able to examine the written awards in the 217 cases where we reviewed the full case files and determine whether the damage awards included a punitive damage component. Of these cases, 80 resulted in plaintiff wins with some amount of damages awarded. Amongst this group, there was a punitive damage award in three cases, two in cases based on employer promulgated procedures and one based on an individually negotiated agreement. What is perhaps more surprising is that all three of these cases were ones in which the plaintiff was an employer. There were no cases in our sample where punitive damages were awarded to an employee plaintiff. We should recognize that given that punitive damages are not awarded in the typical case, even in litigation, and our sample for this aspect was not overly large, we may have just happened to draw a set of cases that did not present appropriate circumstances for punitive damage awards. However, if we look more broadly at the field of employment law, where a key public policy purpose is to counteract the danger of abuses by employers due to their generally greater bargaining power compared to most individual employees in a free labor market, it is highly disturbing that employment arbitrators should be viewing employee defendants and not employers as the appropriate parties against which to award punitive damages. This is an issue that clearly deserves further examination.

4. *How Common are Attorney Fee Awards and How Large are They?*

Another important category of damages in employment law cases are attorney fee awards. This is particularly important as an incentive for plaintiff attorneys to take on cases representing employees who often lack the financial resources to retain counsel out of their personal funds. The prospect of recovering attorney fees provides an incentive for lawyers to take on cases

³⁰ Clermont & Schwab, *supra* note 24, at 433.

where the provable damages may be relatively modest in nature, such as the lost wages of a lower paid employee. Attorney fees are recoverable under the key employment statutes, notably in Title VII employment discrimination cases. In the 217 cases where we were able to review the full arbitration case file and written award, we were able to identify when attorney fees had been included as part of the award. We found that in cases based on employer promulgated procedures with employee plaintiffs, attorney fees were awarded in 17 of the 71 cases (24%) in which there was an award of damages. The median or typical attorney fee award was \$51,710 and the mean attorney fee award was \$76,467. In cases based on individually negotiated agreements with employee plaintiffs, attorney fees were awarded in 13 of 64 cases (20%) in which there was an award of damages. The median attorney fee award was \$48,206 and the mean attorney fee award was \$43,618. These figures indicate that while attorney fees are only awarded in a minority of cases in employment arbitration, they can be substantial, which may provide some incentive for plaintiff attorneys to take on these cases.

5. What Factors Predict Win Rates and Damage Awards?

We have seen that win rates and damage awards vary substantially, depending on whether the case is brought by an employee or an employer plaintiff and whether it is based on an employer promulgated procedure or an individually negotiated agreement. What other factors influence outcomes in employment arbitration? The strongest predictor of outcomes in the data we examined was whether the employee was self-represented or had representation by an attorney. Looking just at cases with employee plaintiffs under employer promulgated procedures, we find that self-represented employees won 17% of cases they brought, whereas employees represented by attorneys won 27.9% of cases they brought. In cases that these plaintiff employees won, self-represented employees were awarded an average of \$11,071 in damages, whereas employees represented by attorneys won an average of \$99,217. Taking into account the chance of winning and the likely damages awarded, the overall mean outcome across all cases, including losses, was \$27,722 for employees represented by attorneys, but only \$1,781 for self-represented employees. These outcomes are strikingly more meager for self-represented employees.

There is also a difference in outcomes depending on whether the case involved claims of discrimination, the key category of statutory claims that has been at the center of much of the debate over employment arbitration. We find that in cases brought by employee plaintiffs under employer promulgated procedures, employees won only 17.6% of cases involving

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claims of discrimination compared to 29.0% of cases involving other types of claims. Where successful in these cases, however, employees who won an award received an average of \$116,191 in cases involving discrimination claims, but only an average of \$63,940 in cases involving other types of claims. Discrimination claims appear harder to prove, but result in larger damage awards where successful.

One other factor that appears to predict outcomes is where the cases occurred. We examined the state in which the case was filed and heard. Our particular interest was whether there was an effect for California cases, since that state is often described as being particularly employee friendly and as having an especially strong plaintiff's bar. We find that in cases with employee plaintiffs under employer promulgated procedures, employees won 35.1% of cases in California compared to 23.1% of cases in other states. Similarly, in cases that employees did win, the average damage award in California was \$131,025 compared to \$70,811 in other states. The resulting overall outcome, including both cases won and lost for employees, is a mean of \$46,035 in California compared to \$16,169 in other states. The anecdotal impressions of a significant California effect are supported by our data.

III. DISCUSSION

Estreicher's Saturn analogy suggests that employer promulgated arbitration procedures could provide a simple, but fair and accessible system for employees to resolve disputes, in contrast to the overly complex and inaccessible system of employment litigation. What do our results indicate about the degree to which this type of dispute resolution has come into existence with employer promulgated arbitration?

Some aspects of the current employment arbitration system do accord with Estreicher's vision. The time it takes to get a hearing, while arguably still too long at around a year, is shorter than typical in the litigation system. The employees bringing claims under employer promulgated procedures are mostly of lower to middle income levels, earning less than \$100,000 a year. Employees do win some cases, just under a quarter of all hearings, and recover some substantial damages, albeit the employee win rates and damage amounts are lower than those found in litigation cases that manage to get to the trial stage. Under the AAA's rules, employers are paying the arbitration fees, which at almost \$10,000 per case could otherwise be a substantial barrier to access.

In other respects, however, the picture is less encouraging for Estreicher's vision of a simple, effective, and accessible system. The typical case in employer promulgated arbitration is a statutory claim based case with

a fairly substantial damage claim of well over \$100,000, which is the type of case we also typically see in litigation. There are relatively few of the smaller claims that are often seen as excluded from accessibility in the litigation system. Although a third of employees are going to arbitration *pro se*, not much higher than the one-quarter *pro se* rate seen in employment litigation, the majority of two-thirds of employees are proceeding in employment arbitration with representation from attorneys. Furthermore, the self-represented employees have lower success rates and receive much smaller damages. What we are seeing is in some ways a replication of the structure of the litigation system, where employees mostly need attorney representation to successfully proceed with claims.

It is also striking the degree to which some of the structural features of the litigation system for how cases proceed are replicated in arbitration. Settlement is the predominant mechanism for resolving cases in litigation, with a smaller number of cases being resolved on preliminary motions and relatively few proceeding to a hearing.³¹ Settlement is similarly the resolution mechanism for most cases in arbitration.³² The perennial problem of how to compare litigation and arbitration outcomes, given that different types of cases may proceed to a hearing, is exacerbated because most cases in both systems are resolved through private settlements where we have limited information on the outcomes. It may be that only the stronger cases in litigation end up going to trial, but it could also be that settlement exerts a similar filtering effect on the cases that proceed to a hearing in arbitration. One important structural difference that is often pointed to in litigation is the availability of summary judgment motions, which result in many cases being dismissed before trial, often to the defendant employer's advantage.³³ Traditionally, summary judgment motions were seen as incompatible with

³¹ Clermont & Schwab, *supra* note 24, at 440; Nielsen, Nelson & Lancaster, *supra* note 22, at 184–88.

³² Nielsen, Nelson & Lancaster, *supra* note 22, at 184, find in their study of federal court litigation that 50% of cases are resolved in the early stages of proceedings and a further 8% following summary judgment motions, for a total of 58% of cases resolved through settlement. Similarly, Colvin, *supra* note 9, at 16, finds in a sample of 3940 employment arbitration cases that 59% were resolved through settlement. In that latter study there was a difference based on representational status, with a 64.8% settlement rate amongst the 75.1% of cases where the employee was represented by an attorney and a 41.8% settlement rate amongst the 24.9% of cases where the employee was self-represented, which combine to yield the overall settlement rate amongst all employment arbitration cases of 59%.

³³ Clermont & Schwab, *supra* note 24, at 433–35.

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the arbitral forum, where the opportunity to obtain a hearing on the merits of the case was seen as an important strength of the process. However, we find that summary judgment motions have become a feature of the employment arbitration process as well, with such motions being brought in a quarter of the cases we examined and most of these motions being successful. It appears that the idea of employment arbitration ensuring a claimant a hearing on the merits of the case is eroding.

A key aspect of accessibility is whether the costs of proceeding with a case through the system are low enough to be justifiable given the likely outcomes of the case. The criticism of litigation as a Cadillac system is grounded in the idea that this will only be true in the court system for a strong case with a relatively large damage claim. What do our results tell us about this calculation for employment arbitration under employer promulgated procedures? The key economic outcome statistic is the average award across all cases, including employee losses, so as to include both the chance of winning and the likely damages that will be awarded if successful. For employee plaintiffs bringing cases under employer promulgated procedures, this amount is just under \$20,000. How does this compare to the cost of bringing a case? Although we do not have direct evidence on this, our results provide some suggestive parameters to work with. The average arbitrator fee in employer promulgated cases is just over \$12,000. It seems reasonable to assume that an attorney would spend at least as much time working on a case as the arbitrator and likely significantly more given the need to engage in preparation and also to conduct pre-hearing discovery. As a result, this can be viewed as a lower bound estimate on the attorney costs for a plaintiff bringing a case. Another suggestive parameter is the size of attorney fees awarded in cases where such fee requests are granted. We find that the typical attorney fee award in employer promulgated procedure cases is a little over \$50,000. Now it is possible that cases in which attorney fees are awarded tend to be ones involving greater complexity and where the burden of such costs on plaintiff employees is higher than usual. For sake of illustration, let us suppose that average attorney fees for employee fees across all cases are only half this amount, or \$25,000. This would also be plausible relative to the size of arbitrator fees charged in cases. However it is also higher, by \$5,000, than what we find to be the mean damages outcome across all cases (about \$20,000 as noted above). Put alternatively, in most cases the cost of obtaining representation to proceed with a case in employment arbitration under employer promulgated procedures will outweigh the potential damages that can be expected to be recovered in these cases. Most often, bringing cases in employment arbitration will not be

economically viable and the system will not be readily accessible to employees.

Now this does not mean that there are no economically viable cases in employment arbitration, and indeed our sample consists of cases that employees chose to proceed with and that employee side plaintiff attorneys chose to represent. Where the attorney identifies the case as involving a relatively strong likelihood of liability and relatively large provable damages then it may make sense to proceed with the case. We do find that most claims are relatively large, over \$100,000, supporting this inference. The possibility of attorney fee awards, which are awarded in a quarter of cases, provides a mechanism for some attorneys to get paid; albeit, given that three-quarters of the cases did not produce such an award, its impact on accessibility is somewhat limited. Furthermore, the one-third of employees who proceed pro se are at least getting a hearing and a small chance of winning some moderate amount of damages with relatively little direct costs in the absence of attorney fees or having to contribute to arbitrator fees. Overall, however, our results indicate that attorney representation is the typical scenario for bringing cases in employment arbitration and that the economic calculus will make it difficult for plaintiff attorneys to accept cases unless they offer relatively high damages and strong prospects of winning.

IV. CONCLUSION

Overall, the system of employment arbitration under employer promulgated procedures appears to us to be strikingly similar to the litigation system in providing relatively little accessibility to employees who do not have strong cases and large provable damages. One concerning aspect of our findings is that we examined all cases for the year 2008 based on employer promulgated procedure administered by the AAA, which is the country's largest provider of employment arbitration services. Yet the whole population of employer promulgated procedure based cases resolved through hearings for the entire year was only 325 cases. Including settlements and cases withdrawn before a hearing, there were still only 946 arbitration cases disposed of that year. This relatively small number of cases is despite employer promulgated procedures now likely covering at least a quarter of nonunion employees in the United States: around 30 million employees.³⁴ If

³⁴ Colvin, *supra* note 5, at 410; David Lewin, *Employee Voice and Mutual Gains*, PROCEEDINGS OF THE 60TH ANNUAL MEETINGS OF THE LABOR AND EMPLOYMENT RELATIONS ASSOCIATION 61, 63 (2008).

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even a third of these procedures use the AAA as the arbitration service provider, we would expect 10 million covered employees.³⁵ This would mean that there is only 1 case per 10,000 employees a year, a remarkably low rate. Where are the missing cases? Our overall conclusion based on our examination of the operation of the system is that they are not being brought because employment arbitration is not providing an accessible, economically viable forum for bringing most employment claims. Instead of a new Saturn system of justice, it appears that employment arbitration appears to have become another Cadillac system for a few plaintiffs and another Rickshaw system for most employees who still do not have access to justice in employment disputes.

³⁵ This may be a conservative estimate given that the number of employees covered by AAA administered employment arbitration procedures grew from 3 million to 6 million between 1997 and 2001. Elizabeth Hill, *AAA Employment Arbitration: A Fair Forum at Low Cost*, 58 DISP. RESOL. J. 9, 9–10 (2003). If growth continued at even half this rate for the next 12 years, we would expect by 2013 some 12 million employees to be covered by AAA administered procedures.

